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May 8, 1998

BY HAND DELIVERY

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re:

In the Matter of Amendment of Section 73.202(b) Table of Allotments FM Broadcast Stations Tylertown, Mississippi
File No.: MM Docket No. 97-45; RM-8961

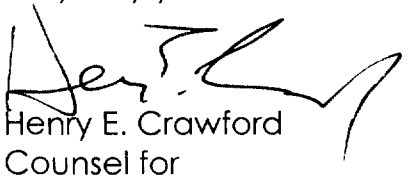
Dear Ms. Salas:

Transmitted herewith on behalf of TRL Broadcasting Company are an original and four (4) copies of its "Opposition to Petition for Reconsideration and Motion to Strike " as directed to the Chief, Allocations Branch.

Due to a communications problem at the time of the filing, counsel was unable to include signed declarations with the pleading. They will be supplied as soon as possible on Monday, May 11, 1998.

Should any additional information be required, please contact this office.

Very truly yours,



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cc: The Chief, Allocations Branch

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of Amendment of Section 73.202(b) Table of Allotments FM Broadcast Stations Tylertown, Mississippi	MM Docket No. 97-45 RM-8961

To: The Chief, Allocations Branch

OPPOSITION TO PETITION FOR RECONSIDERATION AND MOTION FOR STAY

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SUMMARY

In its Petition for Reconsideration and Motion for Stay ("Petition"), Guaranty Broadcasting Corporation ("Guaranty") has attempted to create an abuse of process issue out of a series of mutual business meetings. These allegations are wholly speculative, lack credibility and, furthermore, are not properly raised in an allocations proceeding. Upon close examination, Guaranty's Petition turns out to be entirely frivolous. Therefore, it must be denied.

In the course of this and other proceedings, Guaranty has displayed a pattern of conduct that calls into serious question its ability to deal in a forthright manner with the Commission, file appropriate documents and otherwise comport itself in good faith. Consequently, if any party is guilty of abuse of the Commission's processes, it is Guaranty.

BEFORE THE

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WASHINGTON, D.C.

In the Matter of Amendment of Section 73.202(b) Table of Allotments FM Broadcast Stations Tylertown, Mississippi	MM Docket No. 97-45 RM-8961

To: The Chief, Allocations Branch

OPPOSITION TO PETITION FOR RECONSIDERATION AND MOTION FOR STAY

TRL Broadcasting Company ("TRL Broadcasting"), by counsel, pursuant to 47 CFR 1.429(f), respectfully submits its *Opposition to Petition for Reconsideration and Motion for Stay* in response to the *Petition* for Reconsideration and Motion for Stay ("Petition") filed on February 25, 1998, by Guaranty Broadcasting Corporation ("Guaranty").[1] In support thereof, the following is stated:

I. INTRODUCTION

1. During late 1996 and early 1997, TRL Broadcasting's Roy E. Henderson ("Mr. Henderson"), met with principals of Guaranty to discuss several possible ways of entering various radio markets in southern Louisiana. At the request of these principals, Mr. Henderson agreed to attend several meetings at Guaranty's offices in Baton Rouge, Louisiana. Now, having failed to file an

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[1] TRL Broadcasting sought an extension of time to respond to the Petition until May 8, 1998. See, TRL Broadcasting's April 10, 1998, Reply to Opposition to Motion for Leave to File Response, p. 4, ¶6.

acceptable upgrade proposal for its Baker, Louisiana facility, Guaranty has attempted to turn these discussions into a means for preventing a new FM radio service from being introduced at Tylertown, Mississippi.

2. Guaranty's Petition is so procedurally at odds with the Commission's Rules that it is not entitled to any consideration.[2] Substantively, Guaranty does not contest the Commission's findings that its upgrade proposal was contingent and that the introduction of a new service at Tylertown has more public interest benefits than Guaranty's defective upgrade. Having failed to contest these fundamental aspects of the *Report & Order*, Guaranty now seeks to block the new Tylertown service. Guaranty offers a legal theory that is virtually without legal precedent and fails to rise above the lowest level of speculation. These tactics should not be tolerated and the Petition must be denied.

II. COUNTER-STATEMENT OF THE FACTS

3. The sole proprietor of TRL Broadcasting and Amelia Broadcasting of Louisiana is Mr. Henderson.[3] Mr. Henderson is a broadcaster with over 25 years experience as a Commission licensee.

4. Mr. Henderson's record before the Commission as an applicant and licensee is without blemish.[4]

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[2] On April 16, 1998, TRL Broadcasting filed a Motion to Strike the Petition on the grounds that it unacceptably violated Sections 1.44(e) and Section 1.429(b) of the Commission's Rules.

[3] See Declaration of Roy E. Henderson ("Henderson Declaration") attached hereto as Exhibit 1. All facts contained in this section refer back to the Henderson Declaration, unless otherwise indicated.

[4] In stark contrast, only last year, Guaranty was fined $10,000.00 for failing to adhere to the Commission's EEO guidelines at KJIN-AM and KCIL-FM, Houma, Louisiana. See, *Guaranty Broadcasting Corporation*, 12 FCC Rcd 1660 (1997).

5. Throughout this case, Mr. Henderson has never tried to hide or otherwise conceal his roles in these companies. Mr. Henderson frequently uses business aliases for broadcast ventures in order to attract local advertisers who may be wary of out-of-town group owners. He also uses business aliases in order to deter unscrupulous speculators and avoid unfounded attacks such as the one presented by Guaranty in the Petition.

6. Mr. Henderson has complied with all of the Commission's disclosure rules. He has disclosed his ownership interests in all applications filed before the Commission. Mr. Henderson has never been the "real-party-in-interest" in any broadcast application whether disclosed or undisclosed and no other party has ever been a real-party in-interest in any broadcast application that Mr. Henderson has been involved in.

7. Sometime in the late Summer-Early Fall of 1996, Mr. Henderson became interested in several Louisiana FM radio markets. The Spanish language radio format which he has successfully developed in other markets was not fully represented in southern Louisiana, particularly, New Orleans.

8. In researching the market, Mr. Henderson discovered that KCIL-FM, Houma, Louisiana would be ideal for presenting Spanish language programming in southern Louisiana. Therefore, he contacted, Mr. George A. Foster, Jr. for the purpose of discussing a sale of the station. Mr. Foster agreed to discuss the situation and invited Mr. Henderson to meet with him at the offices of Guaranty Broadcasting Corporation ("Guaranty") in Baton Rouge, Louisiana.

9. In November of 1996, Mr. Henderson flew to Baton Rouge to talk with Mr. Foster. At this preliminary meeting with Mr. Henderson, Mr. Foster appeared to be eager to discuss their mutual interests. During this initial meeting, Mr. Foster asked if Mr. Henderson was interested in buying a station that they had purchased in Chillicothe, Ohio. Mr. Foster related that it had been purchased for the sole purpose of moving it to Columbus, Ohio. However, oppositions had been filed to the plan and he now wished to sell the station. However, Mr. Henderson was not interested in the Columbus, Ohio market. However, Mr. Henderson was led to believe that there were several areas of mutual interest that could be developed with Mr. Foster.

10. Mr. Henderson was next contacted by Guaranty via a telephone call from Mr. Foster. At that time, Mr. Foster asked Mr. Henderson to come to another meeting at Guaranty's offices on December 10, 1996. Mr. Foster advised Mr. Henderson that he wanted to discuss Mr. Henderson's offer to buy KCIL-FM.

11. Mr. Henderson still wished to purchase KCIL-FM, expand the station's signal to be as close to New Orleans as possible and present Spanish language programming. In anticipation of the meeting, Mr. Henderson had several engineering studies prepared involving the cities of Amelia, Baker, Hammond and Picayune, Louisiana as well as Tylertown, Mississippi. The reason for preparing these studies was to see if Mr. Henderson could help Guaranty in a manner that would be mutually beneficial. Mr. Henderson came to the meeting with documentation prepared to show how several Guaranty radio properties could be improved and upgraded. This was valuable business

information which Mr. Henderson was prepared to share with Guaranty as a showing of good faith.

12. Mr. Henderson attended the December meeting along with his son, Brian Henderson. The meeting was arranged by Mr. Foster at his invitation and took place at Guaranty's offices in Baton Rouge.

13. During the meeting Mr. Henderson openly discussed his ongoing rulemaking proposal for Amelia, Louisiana. He believed that once constructed and possibly upgraded, this station would be able to cover the Hispanic community around New Orleans. It would also cover much of the same market as Guaranty's station, KCIL-FM. Therefore, Mr. Henderson discussed with Mr. Foster the idea that he would obtain the license for the Amelia facility and then essentially swap the facility with that of Guaranty. Mr. Henderson would pay Guaranty $2 million under this scenario. Guaranty would take their accounts, programming and equipment for use in Amelia. Guaranty favored a figure closer to $6 million, but did not make a firm offer.

14. Mr. Henderson also showed Mr. Foster that it was possible for Guaranty to upgrade the Baker facility (WTGE-FM). It appeared from Mr. Henderson's research that the only impediments to this upgrade involved: 1) a station in Hammond, Louisiana (WHMD-FM), and 2) the Tylertown, Mississippi rulemaking. Mr. Henderson suggested that if Guaranty was able to get the cooperation of the Hammond station, Mr. Henderson would be willing to withdraw his Tylertown rulemaking as part of an overall deal that would include obtaining KCIL-FM.

15. Mr. Henderson was then informed, for the first time, that Guaranty had already purchased the Hammond station and that the sole purpose of buying the station was to move it in order to get an upgrade of WTGE-FM. Mr. Henderson was further told that Guaranty's sole purpose in buying the Baker station was to make it another Baton Rouge facility.

16. Prior to being advised by Guaranty's principals, Mr. Henderson had never been advised by anyone at Guaranty or otherwise of its plans in this regard. Mr. Henderson never made any mention of possible competitive harm to Guaranty's facility in Houma. Mr. Henderson was at all times proceeding with a good faith understanding that both parties could benefit from the allotment at Amelia.

17. This meeting ended cordially and Mr. Henderson understood that Mr. Foster would review the proposals and contact him for a further meeting with Guaranty's board. Mr. Henderson's son, Ryan, has a similar recollection. His overall recollection is that the parties worked together in a cooperative way without the threat of any harm at all.[5]

18. Sometime in early March or late February of 1997, Mr. Henderson did receive a telephone call from Mr. Foster. The purpose of the call was to invite him to a meeting set to take place on March 7, 1997 at Guaranty's offices in Baton Rouge, Louisiana. Mr. Henderson understood that the meeting would involve his standing offer to purchase KCIL-FM. Mr. Foster expressed his interest in selling KCIL-FM, Houma, Louisiana for $6 Million.

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[5] Declaration of Ryan E. Henderson, attached hereto as Exhibit 2.

19. Mr. Henderson specifically requested at the outset of the March 7, 1997 meeting, and Guaranty verbally agreed, that the substance of the talks would remain confidential. The purpose of the confidentiality request was to allow the parties to speak freely and explore all avenues to resolve the issues.

20. During the March 7, 1997 meeting, Mr. Henderson and Guaranty engaged in what appeared at the time to be good faith negotiations involving Guaranty's broadcast properties. As the substantive talks progressed, Mr. Henderson raised the topic of the Amelia and Tylertown rulemaking proceedings, which had been ongoing for several months prior to the meeting. The purchase of any one of the FM stations would impact those requested allocations. If Mr. Henderson were able to purchase an existing broadcast property in the relevant market, this would obviate the need to seek an allotment. Mr. Henderson was prepared to make whatever accommodations Guaranty sought in order to obtain a facility capable of bringing Spanish language radio to southern Louisiana.

21. Guaranty went over the plan to obtain the Amelia facility as a swap for KCIL-FM. As Mr. Henderson understood Guaranty's position, it would sell Mr. Henderson the equipment and the license, taking with it the call letters, the accounts and all of the station's good will. Mr. Henderson would be barred from using the same format under the terms of an agreement not to compete. Mr. Henderson would do Spanish language programming and Guaranty would have exclusive rights to its existing format at the Amelia facility. Given the conditions of the sale as outlined by Guaranty, Mr. Henderson believed that a fair offer would

be $2 million for the station. Guaranty would be getting significant compensation by virtue of the Amelia facility and the exclusive rights agreement.

22. Throughout the negotiations for KCIL-FM, Guaranty, never seriously proposed a firm counter-offer. All suggestions as to price were qualified. Since there was no counter-offer, Guaranty never learned how much Mr. Henderson was willing to pay for KCIL-FM.

23. Mr. Henderson never threatened or implied that he wished to cause damage to Guaranty. Since he was trying to enter radio markets in which Guaranty was already established, Mr. Henderson realized that he and Guaranty would be competitors. However, Mr. Henderson understood such competition to be healthy for the market. He purposefully sought out the cooperation of Guaranty, and provided it will confidential business information, in order to minimize any hostility that might arise between these two competitors. Suzanne Henderson, who was present at the meeting, never understood Mr. Henderson to threaten any harm to Guaranty through any means.[6]

24. Mr. Henderson never used the phrase "swallowing a chicken bone" or any similar metaphor to describe any situation involving Guaranty. Neither does Suzanne Henderson recall such a phrase.[7] He has been intent throughout the proceeding to obtain and construct a new FM facility at Tylertown, Mississippi. Mr. Henderson will apply for that station in the event that the Commission opens it up for applications. Mr. Henderson always intended to

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6 Declaration of Suzanne Henderson, attached hereto as Exhibit 3, ¶4.

7 *Id.*, ¶5.

construct a new FM facility at Amelia, Louisiana and would have applied for the channel had he been successful in the rulemaking.

25. Mr. Henderson has been involved in numerous rulemakings before the allocations branch and he has never failed to apply for a construction permit in a rulemaking in which he has been successful in obtaining the desired channel.

III. ARGUMENT

26. In its quest to upgrade WTGE, Guaranty has attempted to cast a series of good faith business discussions into an amorphous notion of "abuse." It cites no relevant law in support of its position, for none exists. The allocations branch has no means for sorting through the factual claims alleged by Guaranty and they have no place being raised in this proceeding. Indeed, to the extent that the discussions were understood by the parties to be confidential settlement discussions, they are barred from evidentiary use in accordance with Fed R. Evid. 408. See, *Central Texas Broadcasting, Co., Ltd.*, 52 RR 2d 383, 1385 (Rev. Bd. 1982). Therefore, the Petition must be dismissed and/or denied.

A. Guaranty's Claims Are Not Properly Raised In An Allotment Proceeding

27. As noted in the *Report & Order*, the Allocations Branch is not equipped to resolve the charges made by Guaranty. In *Monterey, Tennessee and Monticello, Kentucky*, 7 FCC Rcd 1606 (1992), the Commission soundly ruled that:

> If a party wishes to raise misconduct allegations addressed to a party participating in an allotment rule making, it may do, so ... in a Petition to Deny an

> application to transfer control of a licensee or through other appropriate means, e.g., the filing of a complaint, a motion to revoke the station's license, or an objection to an application.

Monterey, Tennessee and Monticello, Kentucky, 7 FCC Rcd at 1607. Far from being the only forum for resolving extra-record factual issues,[8] the Commission's ruling makes it clear that there are several more appropriate forums. However, *Monterey, Tennessee and Monticello, Kentucky* also holds firmly that allegations of misconduct, especially bogus ones of the sort raised here by Guaranty, have no place being raised in an allotment proceeding.

28. There is no mechanism to resolve factual disputes involving statements made in private off-the-record business meetings. Already we have seen one Guaranty principal impeach his own sworn affidavit. Yet, TRL Broadcasting has no means of cross-examining that principal. Without the ability to confront accusers, allotment proceedings could easily degenerate into kangaroo courts as parties raise off-the-record matters in order to bolster a rulemaking position. Moreover, such a resolution would hurt the community involved. It should be remembered that in the *Report & Order*, the community of Tylertown was found more deserving of a new service than Guaranty of an upgrade. Tylertown should not be punished because of the reckless collateral attack of a party's self seeking upgrade.

29. In *Monterey, Tennessee and Monticello, Kentucky*, a rulemaking proponent seeking an upgrade, was met with several serious charges including a questionable sale price that was contingent upon the success of the upgrade.

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[8] Petition, Section IV.

This and other allegations that questioned the licensee's validity were found to be inappropriate for resolution in an allotment proceeding. The instant allegations are no more within the context of the rulemaking than those in *Monterey, Tennessee and Monticello, Kentucky*. In both cases, the critical fact is that the conduct is off-the-record and beyond the scope of issues capable of being resolved in an allotment proceeding.

30. In sum, Guaranty is not entitled to the relief it seeks. Depriving the community of Tylertown of a new radio service based on the conduct of a party makes no administrative or regulatory sense. To hold otherwise would open the floodgates to parties wishing to sabotage a rulemaking with off-the-record factual claims, regardless of how outlandish. Therefore, the *Report & Order* correctly held that this docket is not the appropriate forum to resolve any of the issues raised by Guaranty.

B. Guaranty Has Failed To Contest The Substantive Basis For Allotting Channel 297A To Tylertown

31. In the *Report & Order*, the Commission gave two reasons for allotting Channel 297A to Tylertown. In the first instance, Guaranty's upgrade was contingent upon a grant of Guaranty's application to change the transmitter site of WHMD at Hammond, Louisiana. Thus, citing *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615 (1988); *recon. denied*, 3 FCC Rcd 6626 (1988), the Allocations Branch ruled that the upgrade was not entitled to consideration.

32. The second reason for the decision was that the allotment would better advance the FM allotment priorities as set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Under priority (4) a

new FM station in Tylertown would have a higher priority than a mere upgrade of Guaranty's existing station.

33. Despite is length, Guaranty's Petition fails to address either of these substantive basis for the decision. Instead, Guaranty rests its entire case on its highly dubious character attack which was found to be both speculative and irrelevant in the *Report & Order*. It eschews any legal defense of its failed upgrade in favor of a procedurally defective[9], irrelevant[10] and abusive filing. In *Lafayette, Louisiana*, 10 FCC Rcd 6553 (1995), abuse of process was rejected where a party failed to contest the case on the merits, opting instead for an irrelevant collateral attack. Considering these circumstances, Guaranty's Petition is entitled to no consideration.

C. The Real Party In Interest Issue

34. Guaranty's "real-party-in-interest" claim is asserted without any legal authority at all.[11] A real-party-in-interest issue requires some abdication of legal control in one entity by the so called real-party-in-interest. *Paramount Stations Group of Kerrville, Inc., et al.*, 12 FCC Rcd 6135, 6142 (1997). In the present case, TRL Broadcasting is a sole proprietorship owned and run exclusively by Mr. Henderson. By definition there can be no abdication of legal control and there is certainly nothing illegal or untoward in proceeding before the Commission using a business alias.

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9 See, TRL Broadcasting's Motion to Strike.

10 *Monterey, Tennessee and Monticello, Kentucky*, 7 FCC Rcd 1606 (1992)

11 See, Petition, Section II, pp. 4-5.

35. Mr. Henderson has never failed to disclose his ownership interest in any broadcast application that he has filed.[12] Moreover, Mr. Henderson has never been a real-party-in-interest in the broadcast application of any other party and no finding to that effect has ever been made by the Commission.[13]

36. Guaranty is well aware of the law. Acting under its "*nom de plume*" Pearl Broadcasting, Inc., Guaranty stated in a 1991 Motion to Strike that:

> [I]t is true...that the proponent of a new channel allotment is not required to disclose its principals....

Pearl Broadcasting, Inc.'s Motion to Strike, ¶10, p. 6, attached hereto as Exhibit 4. In the present case, Guaranty cannot claim that Mr. Henderson proceeded with any intent to violate the Commission's ownership rules, protect another owned broadcast facility or conceal his involvement in some other broadcast application or proceeding. Absent any indicia of such an intent, a real-party-in-interest has no basis. See, generally, *Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987).

37. Mr. Henderson uses business aliases in broadcast ventures in order to encourage local advertiser support and to discourage speculation in the markets he enters.[14] This manner of proceeding is in complete compliance with the Commission's rules. Guaranty has offered not a singe case in support of its real-party-in-interest issue and, in fact, acknowledged in a 1991 motion that there is no requirement that principals be disclosed in allotment proceedings.

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[12] Henderson Declaration, p. 1, ¶3.
[13] *Id.*
[14] Henderson Declaration, p. 1, ¶2.

Therefore, Guaranty's "real-party-in-interest" issue, like the rest of its wayward legal theories is totally frivolous.

D. The Abuse of Process Issue

38. The gravamen of an abuse of process issue is direct evidence of 1) misrepresentation or, 2) a pattern of filings in which a party expresses an interest in an allotment and either voluntarily dismisses its proposal prior to action in the allotment proceeding or fails to file an application. *Amendment of Section 1.420 and 73.3584 of the Commission's Rules concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3914-3915 (1990). Nothing in the materials submitted by Guaranty demonstrate either prong of the test.

1. There Is No Pattern Of Abusive Filings

39. Guaranty has failed to show even a single case were TRL Broadcasting, Mr. Henderson or any entity operated by him asserted an expression of interest in a rulemaking proceeding and then subsequently failed to apply for the facility. The fact is they cannot make such a showing. Mr. Henderson has been involved in numerous rulemakings before the allocations branch and he has never failed to apply for a construction permit in a rulemaking in which he has been successful in obtaining the desired channel.[15] Absent any evidence to the contrary, Guaranty has no basis for its abuse of process claim.

40. Guaranty's citation to *Santa Isabel, Puerto Rico, and Christiansted, Virgin Islands*, 3 FCC Rcd 2336 (1988) is entirely inapposite. There, the Commission rejected untimely expressions of interest. In the present case, all of

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[15] Henderson Declaration, p. 6, ¶25.

the expressions of interest have been timely. Moreover, the Commission's rationale in *Santa Isabel* was based on the need to uphold the Commission's "procedural rules." *Santa Isabel*, 3 FCC Rcd at 2337, ¶10. In the present case, it is Guaranty that has consistently flaunted the Commission's procedural rules and has even characterized the enforcement of the rules as a "procedural tirade".[16]

41. In the absence of relevant evidence of failed expressions of interest, Guaranty attempts for fabricate a pattern by giving highly misleading interpretations of cases that are grossly irrelevant to this proceeding.

42. Guaranty cites *Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service*, 5 FCC Rcd 4829, 4833 (Rev. Bd. 1990). However, this is mere reargument of the distorted position Guaranty took in its Comments. It is well established that the Commission will not grant reconsideration based on reargument of matters already deliberated and decided. See, *Eagle Broadcasting Company v. FCC*, 514 F.2d 852 (D.C. Cir. 1952).

43. As pointed out in TRL Broadcasting's Reply Comments below, Guaranty relies on a misreading of *Pueblo Radio Broadcasting Service*. Mr. Henderson won that case. He won precisely because his integration pledge was found to be *bona fide*. The Review Board specifically upheld Mr. Henderson's pledge:

> Accordingly, we affirm the ALJ's award of 100% "integration" credit to Pueblo, since there is insufficient reason at this point to question Henderson's commitment, and his ongoing broadcast transactions during the course of this proceeding are fully consistent with the Commission's recognition that

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[16] See TRL Broadcasting's Motion to Strike and related documents.

> principals are not expected "to remain static during often lengthy proceedings." Coast TV, 4 FCC Rcd 1786 (1989)("Coast I") (But see Separate Statement, post.) Moreover, "there has been no allegation that [Henderson's various broadcast transactions] ha[ve] contravened any outstanding Commission rule or policy; and, thus, his 'activities' are irrelevant in the integration analysis." Sarasota - Charlotte Broadcasting Corp., FCC 90R-53, released June 27, 1990, at para. 12.

Pueblo Radio, 5 FCC Rcd at 4830-4831. To ignore the legal holding of this case, as Guaranty does in its Petition, is an act contrary to any notion of fair play and skirts the outer edges of professional ethics.

44. Even the dicta sized upon by Guaranty is presented in an intentionally misleading way. It is clear from *Pueblo Radio* that the only issue of concern in the separate statement was that Mr. Henderson honor his integration pledge at Oro Valley. The case had absolutely nothing to do with any rulemaking proceeding. Moreover, Guaranty puts forward no evidence of any wrongdoing in connection with Mr. Henderson's Oro Valley construction permit. Guaranty is only trying to mislead the Commission again, this time through a completely false reading of *Pueblo Radio*.

45. In sum, Guaranty's citation to *Pueblo Radio* is mere reargument and is inappropriate on reconsideration. Additionally, its "analysis" of *Pueblo Radio* amounts to rank distortion which has no relevance at all to the case at hand.

46. Guaranty also cites dicta contained in a ruling on a preliminary injunction in a civil litigation involving a contractual dispute between Mr. Henderson and KRTS, Inc. *Roy E. Henderson v. KRTS, Inc.*, 822 S.W.2d 769

(Tex. App. 1992). As argued in TRL Broadcasting's motion to strike, Guaranty has offered no reason why it could not have made this argument in comments. The case is six years old. Therefore, Guaranty is barred from raising this argument for the first time on reconsideration in accordance with Section 1.429(b) of the Commission's rules.[17]

47. Even if the Commission were to entertain this untimely argument, it has long held that it is not interested in private contractual matters. See, *e.g.*, *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622, 8624 (Video Services Div. 1992) (general, unsupported and conclusory allegations disregarded by the Commission where they arose in private state court action); *see also John F. Runner, Receiver*, 36 RR2d 773, 778 (1976); *Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987). In the present case, Guaranty is relying upon a purely private contractual dispute that arose out of a station sales agreement. The case involved no findings by the Commission and the Commission played no role at all in the matter.

48. In *Character Qualifications*, 102 FCC 2d 1179 (1986), the Commission narrowed the scope of non-FCC activity that it would consider in proceedings before the Commission to matters involving criminal, antitrust, anticompetitive and other conduct that is not present in this case. Additionally, the Commission will not consider non-FCC matters without there being a final adjudication. *Fox Television Stations, Inc.*, 11 FCC Rcd 7773, 7774 (1996). In the present case, Guaranty has proffered dicta from a preliminary injunction hearing.

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[17] See, TRL Broadcasting's Motion to Strike, Section III.

There was no final decision on the merits because the case was settled by the parties. Consequently, Guaranty's citation to the Texas civil dispute is wholly inappropriate.

49. In sum, Guaranty's claims surrounding the KRTS case have no place being raised for the first time on reconsideration. Moreover, the allegations involve a private contract dispute. The case proffered by Guaranty involved a mere preliminary injunction ruling and not a final adjudication on the merits. Therefore, once again, Guaranty's argument has proven to be wholly frivolous.

50. Having failed to find any sort of pattern of abusive filings, Guaranty conjures up the rulemaking in Amelia, Louisiana in MM Docket No. 97-8, RM-8957. Here again, however, Guaranty hits a dry hole. It asserts that Mr. Henderson "specifically advised Guaranty that the Amelia allotment could adversely impact the competitive posture of Guaranty's station in Houma."[18] That is not true.[19] But even if it were true, Guaranty has not alleged any technical interference with the Houma facility. At most, Guaranty is complaining about economic competition from the Amelia station. However, the Commission does not consider arguments regarding possible economic injury in allotment proceedings. See *Crossville and Hilham, Tennessee*, 6 FCC Rcd 6636 (1991) *citing* *Revision of FM Channel Policies and Procedures*, 90 FCC 2d 88 (1982). In

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[18] Petition, p. 13.
[19] Henderson Declaration, p. 3, ¶13.

the end, Guaranty is left with the absurd argument that adding a competitive voice to a market is an abuse of process.[20]

51. Guaranty appears to also argue that the Amelia proposal should be discredited because there was a lack of a transmitter site and that Amelia was not found to be a community for purposes of the table of allotments.[21] However, the decision not to allot the Amelia station had no relation to the *bona fides* of any of the parties in that case. The proposal was supported by Rice Capital Broadcasting Company, Inc. ("Rice Capital") and it filed an expression of interest in proceeding at Amelia. Rice Capital also filed a map showing a significant land area within the fully spaced area to use as a transmitter site.[22] The fact that the Commission did not agree, by no means shows any sort of improper intent.

52. At the very most, taking every case in a light most favorable to Guaranty, it has failed to show a single case of abusive filing on the part of Mr. Henderson. Instead it has offered misleading case interpretations, private contractual matters and vacuous charges. Therefore, Guaranty's claims here have been found on analysis to be entirely frivolous.

2. There Is No Abuse of Process In This Case

53. While abuse of process is a broad concept, it is not an easy matter to prove and requires far more than a generalized concern that such abuse may be occurring. See *Trinity Broadcasting Of Florida, Inc.*,10 FCC 2d 12020 (ALJ

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[20] That Guaranty may be adverse to competition may be seen in the fact that it already owns both WDGL(FM) and WXCT(FM) in Baton Rouge.

[21] Petition, p. 13.

[22] See Reply Comments of Rice Capital Broadcasting Company, Inc., March 25, 1997.

1995). There has never been a case where arms length business discussions have amounted to an abuse of process and Guaranty has failed to cite even one case on point with the instant case. Guaranty offers no law, just innuendo and speculation. Therefore, Guaranty cannot carry its burden of demonstrating any abuse of process on the part of TRL Broadcasting.

54. **Guaranty's Version Of The Facts Lacks Credibility**. The main thrust of Mr. Henderson's declaration is that he met with Guaranty several times in a good faith attempt to consummate a business deal whereby he would purchase Guaranty's Homua facility, KCIL-FM for the purpose of broadcasting Spanish language programming in an area extending through southern Louisiana to New Orleans. Guaranty on the other hand tries to create the impression that Mr. Henderson acted from bad motives in an attempt to extort the station from them. While many of the facts stated in the declarations overlap, only one scenario can be true. TRL Broadcasting submits that taken as a whole, the facts point invariably to the conclusion that there was no bad faith but only arms length business discussions.

55. For example, it is undisputed that it was Guaranty's own principals who invited Mr. Henderson to all of the meetings at Guaranty's offices in Baton Rouge. Guaranty has never disputed that it was Guaranty's principals who asked Mr. Henderson to come to Baton Rouge at least three times. Had Mr. Henderson been abusing the Commission's processes, Guaranty would not have continued to seek out meetings with Mr. Henderson. Moreover, it appears from Guaranty's own principals that with each visit Mr. Henderson was being asked to meet with a

wider and more prominent group of decision makers at Guaranty. That more closely suggests a *bona fide* business deal rather than a rogue scheme which most likely would not have been handled by the top managers.

56. Guaranty's claim of abuse is further undercut by the fact that it has failed to produce a single document to show that it understood Mr. Henderson to be abusing the Commission's rules. Had there been any sort of abuse, Guaranty would have been compelled to document it in the form of a contemporaneous memorandum or letter. No such documents exist, because this was a simple business negotiation. In the absence of any contemporaneous documentation, Guaranty's version of the facts is simply not credible.

57. Another curious fact is that none of the Guaranty principals ever state that Mr. Henderson actually threatened them. Instead we get language like:

> Mr. Henderson seemed to imply that the Amealia allotment could adversely impact KCIL's competitive posture in the Houma market."

Foster Declaration, p. 4, ¶ 13. This language is almost identical to Mr. Herpin's statement that:

> Mr. Henderson also seemed to imply that the Amelia allotment could adversely impact KCIL's competitive posture in the Houma market.

Herpin Declaration, p. 4, ¶11. Indeed, this language is so close (there is only a one word difference) that it loses whatever credibility it purports to have. It was apparently cooked up by Guaranty for the Petition. But more importantly, "seems to imply" falls way short of demonstrating any abuse of process.

58. Still another peculiarity is the claim that Mr. Henderson some how: